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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 750

PHILLIPS PIPE LINE COMPANY, A CORPORATION,
Petitioner,

vs.

MIKE ANTHONY BELUSKO, JR., AND ANNA CATHERINE BELUSKO,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Seventh Circuit.

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To the United States Court of Appeals for the Seventh Circuit.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on October 10, 1962 (Petition for Rehearing was denied by said court on November 16, 1962).

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit (Appendix, p. 28) is reported at 308 F. 2d 832. The opinion of the United States District Court

for the Southern District of Illinois, Southern Division (Appendix, p. 15) is reported at 198 F. Supp. 140.

STATEMENT OF GROUNDS OF JURISDICTION.

1. The judgment of the United States Court of Appeals was entered October 10, 1962.

2. The petitioner's Petition for Rehearing was denied by the court of appeals by order dated November 16, 1962.

3. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Whether a court of appeals in an action under its appellate jurisdiction by virtue of diversity of citizenship of the parties, may disregard and fail to apply the controlling principles of law, as announced by the highest court of the State in which the case arose, governing the interpretation and construction of instruments granting property rights?

2. Whether, on an appeal involving the interpretation and construction of an instrument granting property rights, a court of appeals may sanction a lower court's departure from accepted and usual judicial proceedings and controlling principles of law?

STATUTE INVOLVED.

The statutory provision involved in this case is the Rules of Decision Act, 28 U. S. C. Section 1652, which reads as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT OF FACTS.

In 1939, Illana Company secured from Elizabeth Mehlberg a "Right of Way Contract" (Record Appendix p. 23) which read as follows:

> "For and In Consideration of the sum of Fifty & no 100 Dollars ($50.00), in hand paid, the receipt of which is hereby acknowledged, Elizabeth Mehlberg, a widow, hereinafter referred to as Grantor (whether one or more), does hereby grant unto Illana Company, a Delaware corporation, hereinafter referred to as Grantee, its successors and assigns, the right to lay, maintain, inspect, alter, repair, operate, replace, remove and relay a pipe line, or pipe lines, for the transportation of oil and gas and products and by-products thereof, water and other substances, and such drips, valves, fittings, meters and other equipment and appurtenances as may be necessary or convenient for such operations, under across the following described land in Montgomery County, State of Illinois, to-wit:
>
> The West Half of the Southeast Quarter of Section 22, Township 8 North, Range 5 West of the Third Principal Meridian
>
> "Together with the rights of ingress and egress to and from said line or lines, or any of them, for the purpose aforesaid. Grantor hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of this State. Grantor to have the right to fully use and enjoy the above described premises, except as to the rights hereinbefore granted; and Grantee hereby agrees to pay any damages which may arise to crops, fences or buildings of said Grantor from the exercise of the rights herein granted.
>
> "Pipe line to be at least 40' from running water spring.
>
> "Should more than one pipe line be laid under this grant, at any time, an additional consideration, calculated on the same basis per lineal rod as the consideration hereinabove recited, shall be paid for each line so laid after the first line.

"Grantee shall bury pipe lines below plow depth, in presently cultivated fields.

"To Have and To Hold said easement, rights, and rights of way unto the said Grantee, its successors and assigns until said easement be exercised, and so long thereafter as the same shall be useful for the above named purposes.

"It is understood that the person securing this grant is without authority from Grantee to make any agreement in respect of the subject matter hereof not herein expressed.

"This agreement is binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

"Executed this 23rd day of Jany, 1939."

In 1939, Illana Company laid an eight-inch pipe line, 72.9 rods in length, across the land described in the Right of Way Contract (Record, Appendix p. 40).

In 1941, the plaintiffs, Mike Anthony Belusko, Jr. and Anna Catherine Belusko, became the owners of such land subject to said Right of Way Contract (Record, Appendix p. 41).

In 1951, Phillips Pipe Line Company, a Delaware corporation, was assigned the rights of Illana Company in and to said Right of Way Contract, including the original pipe line, and subsequently, in 1951, laid and constructed a ten-inch pipe line, 73.1 rods in length, across said land parallel and within eight feet of the first pipe line (Record, Appendix pp. 41, 42).

Prior to the laying of the line in 1951, plaintiffs notified Phillips Pipe Line Company that Phillips Pipe Line Company had no right to lay a second line under said Right of Way Contract and refused the tender of $73.10 from Phillips Pipe Line Company (Record, Appendix p. 42).

Plaintiffs instituted suit against Phillips Pipe Line Company in state court (Circuit Court, Montgomery County,

Illinois), (Record, Appendix p. 2), seeking an injunction to have the second pipe line removed. The cause was duly removed (on grounds of diversity of citizenship of the parties, the plaintiffs being citizens of Illinois and Phillips Petroleum Company and Phillips Pipe Line Company, the original defendants, being foreign corporations duly incorporated and organized under the laws of the State of Delaware, and jurisdictional amount involved) to the United States District Court for the Southern District of Illinois, Southern Division, where such court granted such injunction (Record, Appendix p. 58). The action of the Federal District Court was sustained by the United States Court of Appeals for the Seventh Circuit (Appendix p. 28) and Petition for Rehearing denied (Record).

The injunction was granted by the district court and sustained by the circuit court on the grounds that the grant of the claimed right to lay a second line after the first line had been laid was expressed too indefinitely and uncertainly in the "Right of Way Contract", to be enforced.

REASONS FOR GRANTING THE WRIT.

1. The Decision of the Court of Appeals Is Not in Accord With the Applicable Decisions of the Supreme Court of Illinois.

The sole issue in this case on appeal to the United States Court of Appeals for the Seventh Circuit was whether under the instrument in question the Grantee was granted the right to lay a second line after the first line had been laid thereunder. The issue called for the Circuit Court to determine under controlling principles of law as announced by the Supreme Court of Illinois whether under the instrument in question there was granted the right to lay a second line. The principle of law as announced by the Supreme Court of Illinois was clear:

> Where an easement is claimed under a grant, the language of the *entire* instrument is to be construed to determine whether it was the intention of the parties that the claimed easement was granted.

Thus, in *Shell Oil Co.* v. *Moore*, 48 N. E. 2d 400, 402, 382 Ill. 556, it was said:

> "• • • [T]he purpose of construing a deed [easement] is to arrive at the intention of the parties by examining all portions thereof, and its effect is to be gathered from the entire instrument, and the purpose, if legal, should be enforced so as to not defeat the manifest intention of the parties; and that every word and clause within the instrument should be construed, and if possible, given effect. *Tallman* v. *Eastern Illinois & Peoria Railroad Co.*, 379 Ill. 441, 41 N. E. 2d 537; *Magnolia Petroleum Co.* v. *West*, 374 Ill. 516, 30 N. E. 2d 24, 136 A. L. A. 372; *Woods* v. *Seymour*, 350 Ill. 493, 183 N. E. 458. To ascertain this intention it is necessary to examine the instrument under consideration and determine not only what is granted by the terms thereof, but also what is not granted, and also what was intended by the parties by the covenant or reservation following the granting clause."

Under the controlling principle of law, as announced by the Supreme Court of Illinois, the United States Circuit Court of Appeals for the Seventh Circuit was required to construe all the pertinent portions of the language of the instrument, and specifically, it was required to construe the covenant following the granting clause. The circuit court failed to even comment on the covenant, but looked solely to the granting clause of the instrument in question.

Looking at the instrument in question the following words are found:

> "• • • Grantor does hereby grant unto • • • Grantee • • • the right to lay • • • a pipe line, or pipe lines. • • •"

> "Should more than one pipe line be laid *under this grant, at any time*, an additional consideration * * * shall be paid for each line so laid after the first line." [emphasis supplied.]

That the circuit court in this case overlooked the controlling principle of law, or the language of the instrument last above-quoted (both the principle and the language having been specifically called to its attention), is evident by the circuit court's reliance on the case of *Winslow* v. *City of Vallejo*, 148 Cal. 723, 84 Pac. 191, and its reference to such case as "pertinent" and "persuasive in its reasoning." The language of the circuit court (Appendix, p. 31) on the point is quoted as follows:

> "We agree with the learned District Judge that the critical issue in this case is whether the language of the Right of Way Contract is sufficiently certain so that the intentions of the parties may be determined.
>
> "We hold the Right of Way Contract is too indefinite and uncertain to authorize the claimed right of defendant to lay a second pipe line some twelve years after the original pipe line was constructed.
>
> "A pertinent case that is persuasive in its reasoning is *Winslow* v. *City of Vallejo*, 148 Cal. 723, 84 Pac. 191. There, the question was whether, after the installation of a single water main, the City of Vallejo, by virtue of a grant to it of a right of way for 'any water pipes or mains which may be laid by the city,' had the right to lay an additional main. Holding that the city had no such right, the Court said at page 192 (84 Pac.): ' * * * [W]e see nothing in the language of this grant, or in the conditions existing when it was executed, to indicate that it was intended to give the defendant the right to increase from time to time the number of pipes laid. The appellant's plea for such construction is based largely on the fact that the conveyance throughout uses the words ' "pipes" ' and ' "mains" ' in the plural number, and that therefore, the parties could not have intended to limit the city to a single pipe. But, while the city might, at the outset, have laid more

than one pipe; the most that can be said regarding this language is that the grant is indefinite as to the number of pipes.'

"The interlocutory judgment in favor of plaintiffs is

AFFIRMED."

It is submitted that if the first above-quoted provision (the granting clause) of the instrument in question leaves in doubt whether the Grantee was granted the right to lay one or several pipe lines initially and also the right to lay additional lines, at a later time, the language in the last above-quoted provision (the covenant) of the instrument dispels all such doubt. Otherwise, *what did the parties mean by including words in the instrument relating to the time when more than one pipe line could be laid?* There is no question that the parties to the instrument intended it to grant the right to lay lines, *at any time*. No other language in the instrument militates against such construction. To disregard the language last above-quoted is to fail to follow the guiding principle of law in this case "every word and clause within the instrument must be construed, and if possible, given effect."

How did the Circuit Court construe the following provision of the instrument in question?

> "Should more than one pipe line be laid under this grant, at any time, an additional consideration * * * shall be paid for each line so laid after the first line."

The Circuit Court failed to construe the language at all.

To say there is no language in this instrument to indicate that the parties intended the Grantee to be granted the right to lay additional lines, "at any time" is to wholly ignore the quoted provision.

It is submitted that a simple reading of the language of the entire instrument in this case leaves no doubt but that

the parties intended that the Grantee was granted the right to lay a pipe or pipe lines, *at any time*. Any other result is capricious and unfounded in principle or logic and entirely ignores the language of the instrument wherein the parties expressed their intention. Therefore, this Court should grant the writ of certiorari herein prayed for and reverse the holding of the United States Circuit Court for the Seventh District in this case.

2. The Court of Appeals Sanctioned the Lower Court's Departure From Accepted and Usual Judicial Proceedings and Controlling Principles of Law.

The circuit court affirmed the lower court solely on the basis that the reasoning in *Winslow v. City of Vallejo, supra*, was persuasive on the issue of whether the instrument in question granted the right to lay a second line sometime after the first line was laid. This in itself is sufficient reason for this Court to grant the Petition for Writ of Certiorari, because it manifested a disregard of the applicable principles of Illinois law. However, the circuit court, by affirming the lower court, sanctioned the lower court's departure from accepted and usual judicial proceedings and controlling principles of law, which is further reason for this Court to grant this Petition for Writ of Certiorari.

The lower court said, in holding that the right of way contract was too indefinite and uncertain to authorize the claimed right to lay the second line, that the most important fact was "that no consideration 'per lineal rod' of pipe and no standard by which such consideration is to be determined is recited in any part of the instrument" (Appendix, p. 24).

This reasoning lost sight of the real issue "was the right to lay the second line granted under the instrument"—and introduced the immaterial issue of whether

the consideration to be paid upon the laying of a second line is definite and certain.

In determining whether there was granted the right to lay a second line (the only issue involved in this case), the issue of how much is to be paid upon the exercise of that right is entirely immaterial. To hold otherwise is to ignore a universally accepted principle of law:

> "The fact that the consideration for rights granted is not definitely stated cannot be allowed to defeat the grant of such rights." (29 C.J.S. Deeds § 16, 609)

The Illinois courts have always recognized this universal rule that a conveyance is operative and binding even though *no* consideration is expressed therein; *Gregory* v. *Gregory*, 154 N.E. 149, 323 Ill. 380; *Havill* v. *Kaindl*, 60 N.E. 2d 426, 325 Ill. App. 360; *Redmond* v. *Cass*, 80 N.E. 708, 226 Ill. 120; and the related rule that the recital of consideration is not essential in a grant or conveyance. *Robbs* v. *Ill. Rural Rehab. Corp.*, 40 N.E. 2d 549, 313 Ill. App. 418. Since the recital of consideration is not essential to a grant, how can it be reasoned that an indefinite and uncertain recital of consideration destroys or nullifies the grant itself? The fact that there is some uncertainty as to the amount of money that is to be paid upon the exercise of a right granted cannot affect the passage of title to the right. While indefinite or uncertain consideration in a grant may be reason for reforming the conveyance to show the amount intended as the consideration, there is no known principle of law which indicates that the recital of consideration, definite or indefinite, in a conveyance controls or affects the words of the conveyance whereby the parties sought to express their intention as to what was granted therein.

It is strenuously urged that under the instrument in question there was granted to the Grantee a right, the title

to which passed and became vested immediately upon the execution and delivery of the instrument, to lay a pipe line or pipe lines, at any time. The fact that there may be some question concerning how much money is to be paid when such vested right is exercised, cannot by any line of legal reasoning affect that vested right. The rule, treated as controlling by the lower court, requiring a definite expression of consideration applies only to an executory contract, or a contract to sell land; it does not apply to an executed deed which passes title immediately.

In the circuit court the plaintiffs admitted that under the instrument in question the pipe line company could initially have laid one or more pipe lines, as that right was definitely granted. If this is so, there would still have remained the question of how much consideration the Grantor was to have received for the second line upon laying it at the same time as the first line. This uncertainty under the instrument, concerning the consideration to have been paid for the second line, would not have destroyed the right of the pipe line company to have laid the second pipe line at the same time it laid the first. By the same token, since the right to lay the second pipe line, at any time, was vested at the time the instrument was executed and delivered, the uncertainty concerning the consideration to be paid, when and if the second line is laid, cannot destroy the right to lay the second line at a later time.

The reasoning used by the court below, which was sanctioned by the court of appeals, is so foreign to the issue that was involved in this case, and is such a departure from accepted and usual judicial proceedings and controlling principles of law adopted by the State of Illinois that this Court, in exercising its supervisory powers of the lower courts, is called upon to grant the writ of certiorari herein prayed for and reverse the decision of the United

States Circuit Court of Appeals for the Seventh Circuit and dissolve the injunction that was granted.

3. The Decisions of the Court of Appeals and the District Court Were Clearly Erroneous.

From the foregoing discussion it is evident the decisions of the courts below were clearly erroneous since they did not follow the applicable principles of law as announced by the highest court of the State of Illinois, and, that the district court introduced totally inapplicable principles of law into the case to arrive at its decision.

Since the court of appeals did not follow the law of Illinois and sanctioned the error of the district court, a typical situation is presented in which this Honorable Court has on a number of occasions granted writs of certiorari; *Erie R. Co.* v. *Tompkins*, 304 U.S. 64; *Russell* v. *Todd*, 309 U.S. 280; *Wichita Royalty Co.* v. *City National Bank*, 306 U.S. 103; *Joe Gibson* v. *Phillips Petroleum Company*, 325 U.S. 874. See also Rules of Decision Act, 28 U.S.C. § 1652.

4. The Questions Here Presented Have Great Importance and Far Reaching Effect.

Not only in Illinois, but in all the other states, there have been, and there will be, many, many hundreds of cases involving the question of the correct rules to be applied in the construction of deeds and other instruments wherein property rights are granted. To allow the decision of the United States Court of Appeals for the Seventh Circuit, and the underlying decision of the federal district court, to stand in this case, will invite the lower federal courts to disregard the applicable rules of substantive law as announced by the highest courts of the various states.

This will be particularly true in the State of Illinois.

The federal courts having jurisdiction of disputes in Illinois concerning the construction of deeds and other instruments wherein property rights are granted, will be guided by a different rule of construction from the rule which will guide state courts.

In the interest of doing justice as the case requires (*Tinder* v. *U.S.*, 345 U.S. 565), and in the exercise of its supervisory powers of the lower courts, this Court should be impelled to strike down the uncertainty, confusion and conflict which result from the erroneous concepts implicit in the decisions of the lower courts, grant this Petition for Writ of Certiorari, and reverse the lower courts.

CONCLUSION.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX.

OPINION OF DISTRICT COURT.

IN THE UNITED STATES DISTRICT COURT.
(Caption—1494)

Plaintiffs, Mike Anthony Belusko, Jr., and Anna Catherine Belusko, prosecute this suit against defendants, Phillips Petroleum Company, a Corporation, and Phillips Pipe Line Company, a corporation, for an injunction and an accounting for damages allegedly sustained by plaintiffs as a result of a continuing trespass upon plaintiffs' land.

The facts are stipulated. The decisive issues upon that stipulation of fact grow out of the construction to be placed upon the language of an instrument denominated as a "Right of Way Contract" as follows:

> "For and in Consideration of the sum of Fifty and No/100 Dollars ($50.00) in hand paid, the receipt of which is hereby acknowledged, Elizabeth Mehlberg, a widow hereinafter referred to as Grantor (whether one or more), does hereby grant unto Illana Company, a Delaware Corporation, hereinafter referred to as Grantee, its successors and assigns, the right to lay, maintain, inspect, alter, repair, operate, replace, remove and relay a pipe line, or pipe lines, for the transportation of oil and gas and products and by-products thereof, water and other substances, and such drips, valves, fittings, meters and other equipment and appurtenances as may be necessary or convenient (sic) for such operations under across (sic) the following described land in Montgomery County, State of Illinois, to-wit:

The West half of the Southeast Quarter of Section 22, Township 8 North, Range 5 West of the Third Principal Meridian.

"Together with the rights of ingress and egress to and from said line or lines, or any of them, for the purpose aforesaid, Grantor hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of this State. Grantor to have the right to fully use and enjoy the above described premises, except as to the rights hereinbefore granted; and Grantee hereby agrees to pay any damages which may arise to crops, fences or buildings of said Grantor from the exercise of the rights herein granted.

"Pipeline to be at least 40' from running water spring.

"Should more than one pipe be laid under this grant, at any time, an additional consideration, calculated on the same basis per lineal rod as the consideration hereinabove recited, shall be paid for each line so laid after the first line.

"Grantee shall bury pipe lines below plow depth, in presently cultivated fields.

"To Have and to Hold said easement, rights, and rights of way unto the said Grantee, its successors and assigns until said easement be exercised, and so long thereafter as the same shall be useful for the above named purposes.

"It is understood that the person securing this grant is without authority from Grantee to make any agreement in respect of the subject matter hereof not herein expressed.

"This agreement is binding upon the heirs, executors, administrators, successors and assigns of the parties hereto."

On and prior to January 23, 1939, Mrs. Mehlberg was the fee simple owner of the described premises. On that date, she executed the right of way contract as above set forth and then actually received the $50.00 consideration which is recited. The contract was duly signed and acknowledged

by Mrs. Mehlberg and recorded in the Office of the Recorder of Montgomery County.

Between February, 1939 and October, 1939, Illana laid and constructed an 8-inch pipe line 72.9 rods in length across the premises. Thereafter, on December 13, 1939, Illana paid to Mrs. Mehlberg an additional consideration of $22.90 for the right to construct the line, plus the sum of $25.94 for damages to the land in the construction of the line. Upon receipt of the latter payment, Mrs. Mehlberg executed and delivered to Illana a receipt for damages which stated, in pertinent part, "receipt also includes payment in full for 22.9 rods at $1.00 per rod or $22.90." In addition, that receipt contains a description of the lands to which it related and, by specific reference, affirmed all conditions and terms of the original right of way contract and acknowledged that all such terms and conditions had been faithfully performed and kept by Illana in laying the pipe line across the premises.

On November 30, 1939, Illana assigned the right of way contract to Phillips Petroleum Company. On June 30, 1951, the latter assigned the contract to defendant, Phillips Pipe Line Company, which is hereinafter referred to as Phillips. Phillips is, and at all pertinent times has been, the owner of the right of was contract and the rights created thereunder.

On October 14, 1951, plaintiffs became the owners in fee simple of the premises, subject to said right of way contract, by virtue of a deed from the heirs of Mrs. Mehlberg. The receipt from Mrs. Mehlberg for damages and additional consideration for the laying of the original pipe line was never recorded. Plaintiffs, at the time when they purchased and entered into possession of the premises had no knowledge or notice of the existence thereof, and no knowledge or notice of the fact that money had been paid to Mrs. Mehlberg as represented by the receipt.

By a letter dated August 1, 1951, Phillips tendered to plaintiffs a check in the amount of $73.10 as consideration for the laying of an additional pipe line 73.1 rods in length across the premises. Plaintiffs refused to accept the tendered check. They returned it to Phillips with the statement of plaintiffs' position that Phillips had no right to lay a second line under the provisions of the Mehlberg contract. During the month of September, 1951, Phillips entered upon the premises and laid and constructed a 10 inch pipe line 73.1 rods in length across the premises parallel to, and some 8 feet from the location of the original line laid by Illana. Subsequent to that construction Phillips has operated the 10 inch pipe line for transportation of petroleum products. At all material times Phillips has made a continuing tender of $73.10 as consideration for the laying of the second line and also of payment for construction damages. Plaintiffs have continuously refused to accept either tender, contending that the provisions of the original right of way contract did not contemplate the laying of the second line across the land.

Since it is stipulated that Phillips is, and at all pertinent times has been, the owner of the rights under the right of way contract, I find that Phillips is the only party defendant having an interest in the litigation. Plaintiffs' complaint will therefore, be dismissed as to Phillps Petroleum Company.

Under the Illinois Recording Act, plaintiffs are not chargeable with notice of instruments which did not appear of record at the time when they purchased the real estate. *Home Savings & State Bank* v. *Peoria Agricultural & Trotting Soc.*, 206 Ill. 9, 13-14; *English* v. *Lindley*, 194 Ill. 181, 193-194; *Bullock* v. *Battenhausen*, 108 Ill. 28, 35-36. Since the receipt signed by Mrs. Mehlberg relating to the subject easement and real estate was not recorded, plaintiffs are

bona fide purchasers without notice of its provisions. Phillips' rights as against plaintiffs must, therefore, be determined from the face of the original right of way contract alone.

No question is presented as to the right of Phillips to maintain and use the first pipe line. Plaintiffs concede that Phillips, as remote assignee of Illana, has the legal right to maintain and use the original 8 inch pipe line under the terms of the right of way contract executed by Mrs. Mehlberg. By their complaint, which seeks an injunction against the continued maintenance of the second pipe line across the premises and an accounting for damages for a continuing trespass thereon, plaintiffs state some twelve alternative theories upon which it is alleged that the right of way contract is null and void to the extent that it is contended to authorize the laying of pipe lines in addition to the first. In the view which I take of the case, it is necessary to consider only two general categories of such alternative contentions, namely, that to the extent that the contract is contended to contemplate the laying of additional pipe lines, it violates the rule against perpetuities and is, therefore, void and unenforcible, and that the contract is too indefinite and uncertain in its provisions to be enforced against plaintiffs.

Plaintiffs ardently urge upon the court the rule against perpetuities as a bar to Phillips' claimed right to lay and maintain the second line under the Mehlberg contract. They argue that the contract is ambiguous in that the consideration to be paid for the construction of the second line and the time of payment thereof cannot be determined from the face of the contract; that, therefore, the contract, at most, constitutes an agreement to sell an interest in land at any time in the future when the grantee might choose to purchase; and that such an unlimited agreement violates the rule against perpetuities and is void.

That contention is rejected. Although the right of way contract is ambiguous, the easement thereby granted, is, in its full scope, a vested interest. In pertinent part the contract provides that the grantor, for a valuable consideration, "does hereby grant to Illana Company * * * the right to lay, maintain, etc., a pipe line, or pipe lines for the transportation of oil and gas * * *" with the right of ingress and egress to and from the described premises for the purposes of laying and maintaining such line or lines. Whatever the rights created by the instrument, they became vested in Illana when the instrument was delivered and the consideration therefor was paid.

The facts of this case are not remotely parallel to those of *Barton* v. *Thaw*, Pa., 92 Atl. 312, upon which plaintiffs principally rely. There the court dealt with a covenant in a conveyance of mineral rights by which the grantor, his heirs and assigns, agreed to convey the fee estate to grantees, or their heirs or assigns, should the latter "at any future time whatsoever desire to purchase any of the land in fee simple." The court said that it was dealing with a covenant to sell land which was limited in time only by the bounds of eternity and which was therefore void and violative of the rule against perpetuities. *Ryan* v. *Beshk*, 339 Ill. 45; *Beatty* v. *Stanley*, 298 Ill. 444; and *Johnson* v. *Preston*, 226 Ill. 447, are equally distinguishable. In each of those cases, the court found that an interest in land created by grant or devise was contingent upon an event which might not occur within the limits of the rule against perpetuities.

If the grant of this contract is broad enough in scope to encompass the right to lay the second pipe line, the fact that an exercise of that right might be delayed for a millennium would not bring the rule against perpetuities into play. On the contrary, that fact is a common incident of utility right of way grants. Such grants have been re-

peatedly interpreted as creating an expansible easement, i.e., a vested right to expand the user and to increase the burden upon the servient land as the needs of the holder of the easement might require. E.g., *Hamilton* v. *Trans-Continental Gas Pipe Line Corp.*, Miss., 110 So. 2d 612; *Sorrell* v. *Tennessee Gas Trans. Co.*, Ky., 314 S. W. 2d 193; *Baker* v. *Tennessee Gas Trans. Co.*, Tenn., 250 S. W. 2d 566; *Babler* v. *Shell Pipe Line Corp.*, E. D. Mo., 34 F. Supp. 10; *Caruthers* v. *Peoples Nat. Gas Co.*, Pa. Super., 38 A. 2d 713; Violation of the rule against perpetuities was urged in both the *Hamilton* and *Caruthers* cases and rejected by the court in each instance. I accept those decisions as well reasoned and correct, and as in accordance with the law of Illinois that postponement of use or enjoyment of a vested interest does not bring the interests with the rule. *Chicago Title & Trust Co.* v. *Shellaberger*, 399 Ill. 320, 334; *Fleshner* v. *Fleshner*, 378 Ill. 536, 540-41; *O'Hare* v. *Johnston*, 273 Ill. 458, 463.

As I see it, the critical issue of this case is whether the language of the right of way contract is sufficiently certain that the intentions of the parties may be determined. Construing an easement which was strikingly similar to this contract, the court, in *Babler* v. *Shell Pipe Line Corp.*, E. D. Mo., 34 F. Supp. 10, 12, stated the following admonition which is here pertinent:

> "At the outset, it may be observed that while a court may construe an agreement, no court has the power or right to make agreements for parties either expressly or under the guise of construction. Obviously, the easement on its face is indefinite and uncertain. Insofar as the intent of the parties may be ascertained from the easement, the contract evidenced thereby will be declared and made certain. Insofar as the easement omits entirely any agreement on some of the questions now in dispute, the court must leave the parties where they are lest by doing otherwise new

and additional agreements and contracts be foisted upon them by judicial construction."

It is obvious to the court that this right-of way contract is ambiguous. Each of the parties, by stressing particular language drawn from the contract, to the exclusion of other parts thereof, asserts an intention of the parties to the contract consistent with the respective positions taken. Plaintiffs insist that, with reference to the right to lay the second pipe line, the contract created nothing more than an option to purchase further rights at an indeterminate time in the future for a consideration which cannot be ascertained from the face of the instrument. Phillips, with equal fervor, finds a present grant of the right to lay the first line and additional lines as the need therefor should arise. However, the position of each can be sustained only by reading into the contract provisions which are not necessarily implied by the language adopted by the contracting parties. Each party, in effect, is asking the court to rewrite the contract consistently with the position which he has taken. This the court may not do. Its power is to determine the intent of the parties as far as it is expressed in the language which the parties adopted. If the intent may not be determined as to any question in dispute, the contract is, to that extent, without force.

The right of way contract in issue partakes of the characteristics of both a conveyance or grant of a right in land and a contractual agreement for permissive rights in the future. The language used is ambiguous as to both characteristics.

While it is clear that a right in land, an easement, is granted, it is far from clear what that right may be, except as to the area not in dispute. Plaintiffs concede that the grant encompasses the right to lay, maintain and use,

perpetually, the pipe line laid in 1939. It is not clear, however, whether any right in addition thereto was granted.

Under the granting clause, Mrs. Mehlberg granted to Illana "the right to lay," maintain, operate, etc., "a pipe line, or pipe lines" for the transportation of petroleum products under and across the described premises, together with the right of ingress and egress "to and from said line, or lines, or any of them," for that purpose, to have and to hold the easement "and rights of way" unto Illana "until said easement be exercised and so long thereafter as the same shall be useful for the purposes stated."

If that granting clause, alone, were considered, the grant is indistinguishable from the grant in litigation in *Winslow* v. *City of Vallejo, Cal.*, 84 Pac. 191. There a grant of a right of way "for any water pipes or mains" which might be laid by the City was construed to not include the right to make a second entry upon the land to lay any pipe in addition to the single pipe first laid by the city. In pertinent part the court said:

> "The rule is well settled that where a grant of an easement is general as to the extent of the burden to be imposed upon the servient tenement, an exercise of the right, with the acquiescence and consent of both parties, in a particular course or manner, fixes the right and limits it to the particular course or manner in which it has been enjoyed." 84 Pac. at 192.

To the argument that the use of the plural "pipes" and "mains" throughout the grant showed an intention to permit the laying of pipes in addition to that first laid, the court stated that the city might, at the outset, have laid more than one pipe, but that the City, having elected to lay one pipe only, was bound by that election.

The decision in *Winslow* is in apparent accord with the law of Illinois. E.g., *Esler* v. *Village of Grosse Point*, 223 Ill. 230; *Sullivan* v. *Bagby*, 335 Ill. 192, 195-96.

Plaintiffs rely upon the *Winslow* case as decisive of the issue here, but that reliance is misplaced. In addition to the granting clause above summarized, the right of way contract contains additional provisions which must be given effect if possible to do so, *Rhomberg* v. *Texas Co.*, 379 Ill. 430; *Smith* v. *Grubb*, 402 Ill. 451, 461-62, upon application of the established principle that a court, in construing a written instrument, must give consideration to the instrument as a whole. *Midwest-Radiant Corp* v. *Hentze*, 7 Cir., 171 F. 2d 635, 638; *Walker* v. *Illinois C. R. Co.*, 215 Ill. 610, 618.

Of these additional provisions, principal reliance is placed by Phillips upon the following: "Should more than one pipe be laid under this grant, *at any time*, an additional consideration, calculated on the same basis per lineal rod as the consideration hereinabove recited, shall be paid for each line so laid after the first line." (Emphasis supplied.) Phillip argues, stressing the emphasized "at any time", that the latter clause clearly expresses the intention of the parties that the grant was to be of an expansible easement for the laying of pipes from time to time as the needs of the easement holder might require.

As does the plaintiffs' argument upon the *Winslow* case, Phillips' argument begs the question by ignoring certain salient provisions of the instrument and facts, to-wit: (1) the provisions, "Grantor to have the right to fully use and enjoy the above described premises, except as to rights hereinbefore granted", which precedes the clause upon which Phillips' reliance is placed; (2) the provisions, "Grantee to bury pipes below the depth, *in presently cultivated* fields", (Emphasis supplied); and (3) most important, in the view which I take of the case, the fact that no consideration "per lineal rod" of pipe and no standard by which such consideration is to be determined is recited in any part of the instrument.

Considered as a whole, the instrument is so vague that, although the court has kept this case under advisement for a period of some weeks, the court can still only guess at the intention of the parties. While it would seem apparent that the laying of additional lines was in the contemplation of the parties to the instrument, neither, as grantor and grantee, respectively, saw fit to spell out the contemplated user by express grant or any provision which would spell out their intention as to location of additional lines in relation to the location of the first and which would provide a basis for computing the consideration for any line which might subsequently be laid. Although a number of courts have held that a rule of reasonable enjoyment of the easement will govern the question of the location and number of additional lines when the consideration for the exercise of a right to impose an additional burden may be determined, e. g., *Crawford* v. *Tennessee Gas Trans. Co.*, Tex., 250 S. W. 2d 237, 240; *Fulcher* v. *Dierks Lumber & Coal Co.*, Ark., 261 S. W. 645, 648; cf. *Perry* v. *Wiley*, 285 Ill. 25, 29-30; *Barber* v. *Allen*, 212 Ill. 125, 131-33, no case is found in which a court, under the guise of construction, has decreed the element of consideration where the instrument in question provided no standard for that determination. In that respect, this right of way contract is analogous to the lease which was before the court in *Folsom* v. *Harr*, 218 Ill. 369. There the court held a clause in a lease which provided that the lessee was to have the first "chance" to buy the leased premises should the lessor decide to sell, too indefinite and uncertain for enforcement for the reason that no standard for fixing a sale price was stated in the agreement.

I conclude that the right of way contract is too indefinite and uncertain to authorize the claimed right to lay the second line, and that Phillips acted at its peril when it entered the land for that purpose despite plaintiffs' protests. The

effect of that conclusion is the further conclusion that Phillips, by its unauthorized act, increased the burden upon plaintiffs' land without the right so to do. An injunction is the appropriate remedy. *Texas Co. v. O'Meara*, 377 Ill. 144; *Esler v. Village of Grosse Point*, 223 Ill. 230; *Carpentier v. Capitol Elec. Co.*, 178 Ill. 28.

The following cases relied upon by Phillips are clearly distinguishable from the case at bar. *Hamilton v. Transcontinental Gas Pipe Line Corp.*, Miss., 110 So. 2d 612; *Sorrell v. Tennessee Gas Trans. Co.*, Ky., 314 S. W. 2d 193; *Crawford v. Tennessee Gas Trans. Co.*, Tex., 250 S. W. 2d 237; *Baker v. Tennessee Gas Trans. Co.*, Tenn., 250 S. W. 2d 566; *Tennessee Gas Trans. Co. v. Bayles*, W. D. La., 74 F. Supp. 258; *Caruthers v. Peoples Natural Gas Co.*, Pa. Super., 38 A. 2d 713; *Patterson v. Chambers Power Co.*, Ore., 159 Pac. 568. In each of those cases, the instrument under construction contained an express grant of the right to expand the burden upon the servient land, from time to time, in excess of the original user. Where that were a factor, each instrument also fixed the consideration to be paid for expansion of the user.

The instrument construed in *Babler v. Shell Pipe Line Corp.*, E. D. Mo., 34 F. Supp. 10, is distinguishable from this right of way contract in at least two particulars. First, the grant was "the right of way, *from time to time* to lay * * * pipes and pipe lines" across described premises. (Emphasis supplied.) Secondly, the consideration for the laying of lines in addition to the first line was recited to be "the same consideration per lineal rod as that paid for the first line." No issue was presented as to indefiniteness of the consideration for lines subsequent to the first, and the court summarized the grant as clearly conferring "the additional right to construct additional lines without limit as to number but upon payment of a stipulated amount per lineal foot (sic)." 34 F. Supp. at 13.

What has been said disposes of Phillips' argument that consideration for the right to lay the second line must be presumed from the fact that the right of way contract bears a private seal. Assuming that adequate consideration supports the claimed right, the grant of the right is too indefinitely expressed in the contract to permit it to be enforced.

Finally, plaintiff's argument that the easement created by the contract, being not appurtenant to a dominant estate in land, was not assignable is rejected upon the language of the contract itself and upon a common sense recognition that the rule of nonassignability of easements in gross can have no application to commercial utility and railroad rights of way. See, to that effect, *Johnston* v. *Michigan Consol. Gas Co.*, Mich., 60 N. W. 2d 464.

My findings of fact and conclusions of law are contained in the above memorandum.

The complaint will be dismissed as to the defendant, Phillips Petroleum Company. Judgment will be entered for plaintiffs against the defendant, Phillips Pipe Line Company, for an injunction in accordance with the prayer of the complaint. Plaintiffs shall submit a judgment order, prepared in accordance with the views herein expressed, to Phillips for approval as to form and then to the court for entry. At Phillips' request, such judgment order may include the requisite findings under 28 U. S. C. 1292(b) for an interlocutory appeal.

The issues upon assessment of damages are reserved for trial at a future date.

Dated this 12th day of September, 1961.

Frederick O. Mercer,
United States District Judge.

OPINION OF UNITED STATES COURT OF APPEALS.

IN THE UNITED STATES COURT OF APPEALS.
For the Seventh Circuit.

No. 13673 September Term and Session 1962

MIKE ANTHONY BELUSKO, JR. and ANNA CATHERINE BELUSKO, *Plaintiffs-Appellees*, v. PHILLIPS PETROLEUM CO., a Corporation, and PHILLIPS PIPE LINE CO., a Corporation, *Defendants-Appellants*. } Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

October 10, 1962

Before HASTINGS, *Chief Judge*, DUFFY and SCHNACKENBERG, *Circuit Judges*.

DUFFY, *Circuit Judge*. Plaintiffs in this suit sought an injunction requiring defendants to remove a pipe line from their property and for an accounting for damages because of a continuing trespass of the pipe line on their land.

The District Court enjoined defendant, Phillips Pipe Line Co., from maintaining a second pipe line across plaintiffs' premises, and ordered that said second pipe line which had been laid should be removed.

On January 23, 1939, Elizabeth Mehlberg, a widow, who was the owner of certain property in Montgomery County, Illinois, executed and delivered to Illana Company an instrument entitled "Right of Way Contract" which was

recorded in the office of the Clerk and Recorder for Montgomery County. Between February and October 1939, Illana Company laid and constructed an 8 inch pipe line, 72.9 rods in length, across the Mehlberg property. The $50 mentioned in the contract was paid to Mrs. Mehlberg by the Illana Company at the time of the execution and delivery of the contract, and later she was paid an additional $22.90 compensation, and also the sum of $25.94 for pipe line damages.

On November 30, 1939, the Right of Way Contract and the 8 inch pipe line were assigned by Illana Company to Phillips Petroleum Company, who later assigned its rights in the contract and pipe line to defendant, Phillips Pipe Line Co. On October 14, 1941, plaintiffs became the owners in fee simple of the above-described lands, subject only to the "Right of Way Contract."

During September 1951, Phillips Pipe Line Co., over the objection of plaintiffs, laid and constructed within eight feet of the first pipe line, a 10 inch pipe line 73.1 rods in length across the lands owned by plaintiffs. Phillips Pipe Line Co. made a tender of $73.10 as consideration for the additional pipe line, and also made an offer to plaintiffs in settlement of the construction damages, all of which plaintiffs refused to accept.

The "Right of Way Contract" provides as follows:

> "For and in Consideration of the sum of Fifty & No/100 Dollars ($50.00) in hand paid, the receipt of which is hereby acknowledged, Elizabeth Mehlberg, a widow hereinafter referred to as Grantor (whether one or more), does hereby grant unto Illana Company, a Delaware corporation, hereinafter referred to as Grantee, its successors and assigns, the right to lay, maintain, inspect, alter, repair, operate, replace, remove and relay a pipe line, or pipe lines, for the transportation of oil and gas and products and by-products thereof, water and other substances, and such drips, valves, fittings, meters and other equipment and ap-

purtenances as may be necessary or convenient for such operations under across the following described land in Montgomery County, State of Illinois, to-wit:

The West half of the Southeast Quarter of Section 22, Township 8 North, Range 5 West of the Third Principal Meridian.

"Together with the rights of ingress and egress to and from said line or lines, or any of them, for the purpose aforesaid, Grantor hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of this State. Grantor to have the right to fully use and enjoy the above described premises, except as to the rights hereinbefore granted; and Grantee hereby agrees to pay any damages which may arise to crops, fences or buildings of said Grantor from the exercise of the rights herein granted.

"Pipe line to be at least 40' from running water spring.

"Should more than one pipe line be laid under this grant, at any time, an additional consideration, calculated on the same basis per lineal rod as the consideration hereinabove recited, shall be paid for each line so laid after the first line.

"Grantee shall bury pipe lines below plow depth, in presently cultivated fields.

"To Have and to Hold said easement, rights, and rights of way unto the said Grantee, its successors and assigns until said easement be exercised, and so long thereafter as the same shall be useful for the above named purposes.

"It is understood that the person securing this grant is without authority from Grantee to make any agreement in respect of the subject matter hereof not herein expressed.

"This agreement is binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

"Executed this 23rd day of Jany. 1939."

The District Court pointed out that no consideration "per lineal rod" of pipe, and no standard by which such consideration is to be determined, is recited in any part of

the instrument. The District Court stated: ". . . [N]o case is found in which a court, under the guise of construction, has decreed the element of consideration where the instrument in question provided no standard for that determination."

The District Court concluded that the right of way contract is too indefinite and uncertain to authorize the claimed right to lay a second pipe line, and that Phillips acted at its peril when it entered plaintiffs' land for that purpose despite plaintiffs' protests.

Judgment for plaintiffs was entered for an injunction in accordance with the prayer of the complaint, but jurisdiction was retained to determine the amount of damages. Requisite findings were made under 28 U. S. C. sec. 1292(b) so that an immediate appeal might be taken.

We agree with the learned District Judge that the critical issue in this case is whether the language of the Right of Way Contract is sufficiently certain so that the intentions of the parties may be determined.

We hold the Right of Way Contract is too indefinite and uncertain to authorize the claimed right of defendant to lay a second pipe line some twelve years after the original pipe line was constructed.

A pertinent case that is persuasive in its reasoning is *Winslow v. City of Vallejo*, 148 Cal. 723, 84 Pac. 191. There, the question was whether, after the installation of a single water main, the City of Vallejo, by virtue of a grant to it of a right of way for "any water pipes or mains which may be laid by the city," had the right to lay an additional main. Holding that the city had no such right, the Court said at page 192 (84 Pac): ". . . [W]e see nothing in the language of this grant, or in the conditions existing when it was executed, to indicate that it was intended to give the defendant the right to increase from time to time the number of pipes laid. The appellant's plea for such con-

struction is based largely on the fact that the conveyance throughout uses the words 'pipes' and 'mains' in the plural number, and that, therefore, the parties could not have intended to limit the city to a single pipe. But, while the city might, at the outset, have laid more than one pipe, the most that can be said regarding this language is that the grant is indefinite as to the number of pipes."

The interlocutory judgment in favor of plaintiffs is

AFFIRMED.